

December 18, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Terry Martin Apodaca

Date of Filing: December 4, 2007

Case Number: TFA-0231

On December 4, 2007, Terry Martin Apodaca filed an appeal from a determination issued to her on November 20, 2007 by the National Nuclear Security Administration (NNSA) Service Center. This determination responded to a request for information that Ms. Apodaca submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. NNSA was able to locate some, but not all documents responsive to Ms. Apodaca's request. This Appeal, if granted, would require NNSA to perform an additional search and either release any newly discovered responsive documents or issue a new determination justifying the withholding of any portions of those documents.

I. Background

On April 11, 2007, Ms. Apodaca filed a FOIA request asking for the following documents: (1) personnel actions, and associated paperwork, for all Office of Public Affairs (OPA) employees from January 1, 2000 to the present; and (2) the title and grade of eight named OPA employees. *See* Letter from Terry Martin Apodaca to Carolyn A. Becknell, FOIA Officer, OPA (April 11, 2007) (FOIA Request). NNSA provided a partial response to Ms. Apodaca's FOIA request on September 20, 2007, when it released the Notification of Personnel Actions or Standard Form 50 (hereinafter SF-50) and the title and grade for the eight named employees, including Carolyn Becknell and Tracy Loughhead.¹ *See* Letter from Carolyn Becknell, NNSA to Terry Martin Apodaca (September 20, 2007) (Partial Determination Letter).

¹ Due to the budget imposed by Ms. Apodaca, the NNSA was unable to provide all of the requested documents. Therefore, the NNSA issued a partial response to Ms. Apodaca's April 11, 2007 FOIA request. *See* FOIA Request.

Ms. Apodaca then filed an Appeal² of the partial response (1st FOIA Appeal) with the Office of Hearings and Appeals (OHA), challenging the adequacy of the NNSA's search that resulted in its Partial Determination. *See* Letter from Terry Martin Apodaca to OHA (received October 31, 2007) (1st Appeal Letter). In her 1st FOIA Appeal, Ms. Apodaca asserted that the NNSA did not provide her with the Request for Personnel Action or Standard Form 52 (hereinafter SF-52) and justification for each personnel action. *Id.* During the pendency of the 1st FOIA Appeal, Ms. Apodaca narrowed the scope of her FOIA request to only the SF-52s and the associated justifications for the following personnel actions: 1) Group Cash Award of \$200.00 effective August 10, 2006, for Carolyn Becknell (Becknell Award); 2) "Irregular" Performance Pay Quality Step Increase (QSI) effective March 4, 2007, for Carolyn Becknell (Becknell QSI); 3) Change to Lower Grade effective April 17, 2000, for Tracy Loughead (Loughead Grade Change); and 4) Special Act or Service Award effective August 27, 2000, for Tracy Loughead (Loughead Award). *Id.*

In response to Ms. Apodaca's 1st FOIA Appeal, the NNSA told OHA that it would send Ms. Apodaca the SF-52s. *See* Electronic Mail Message from Shirley Peterson, NNSA to David Petrush, OHA (November 10, 2007) (November 2007 Email). The NNSA later informed OHA that it would provide Ms. Apodaca with three of the four SF-52s because the fourth document no longer existed. *See* Memorandum of Telephone Conversation between Shirley Peterson, NNSA, and David Petrush, OHA (November 28, 2007) (Peterson Telephone Memo).

In a Final Determination Letter sent to Ms. Apodaca, NNSA provided Ms. Apodaca with three documents: 1) the SF-50 for the Becknell Award; 2) the SF-52 for the Becknell QSI; and 3) the SF-52 for the Loughead Grade Change. *See* Letter from Carolyn Becknell, NNSA, to Terry Martin Apodaca (November 20, 2007) (Final Determination Letter). As regards to the fourth document relating to the Loughead Award, the NNSA stated that the SF-50 had been released to Ms. Apodaca in September 2007 and that the SF-52 relating to the Loughead Award was destroyed when it became two years old, in accordance with the agency's record retention policy. *Id.*; *see* Partial Determination Letter.

On December 4, 2007, Ms. Apodaca filed this Appeal (2nd FOIA Appeal) of the Final Determination Letter issued by NNSA. *See* Letter from Terry Martin Apodaca to OHA (received December 4, 2007) (2nd Appeal Letter). In the 2nd FOIA Appeal, Ms. Apodaca challenges the adequacy of the search that was conducted with regard to her request for the SF-52 and the award justification relating to the Loughead Award. *Id.* In her pending Appeal, Ms. Apodaca argues that "if all copies of the SF-52 have been destroyed..., [NNSA should've included]...the date of destruction, destruction official's name, as well as a copy of the certificate of destruction." *Id.* In this Appeal, Ms. Apodaca is requesting that the NNSA provide her with: (1) the SF-52 and the justification for the Loughead Award; (2) the SF-52 for the Becknell Award and (3) the justification for the Becknell QSI. *Id.*

² This Appeal has been designated OHA Case No. TFA-0230.

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must “conduct a search reasonably calculated to uncover all relevant documents.” *Truitt v. Dep’t of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). “[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials.” *Miller v. Dep’t of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, 28 DOE ¶ 80,239 (2002) (Case No. VFA-0760).³

In reviewing this appeal, we contacted the NNSA to ascertain the scope of its search for responsive documents. *See* Memorandum of Telephone Conversation between Carolyn Becknell, NNSA, and Avery Webster, OHA (December 5, 2007) (Becknell Telephone Memo). In response to Ms. Apodaca’s request for the SF-52 with the award justification for the Loughhead Award, NNSA contacted its Human Resources Department, which provided the following information. *See* November 2007 Email. In each employee’s Official Personnel File (OPF), the SF-52 is prepared before the SF-50. *Id.* The SF-52 is placed on the left side of the file and contains the justification for the SF-50. *Id.* The SF-52 is purged every two years, or when an employee retires or leaves the agency. *Id.*; *see also* Becknell Telephone Memo. The SF-50 is the notification to the employee that this action has been taken. *See* November 2007 Email. SF-50s are placed on the right side of the employee’s OPF and are permanent records. *Id.*

Ms. Apodaca requested the SF-52 created over seven years ago for the Loughhead Award. *See* December 4, 2007 Appeal Letter. After conducting a search, the NNSA could not locate this document because, in accordance with the agency’s record retention policy, it had been destroyed. *See* Becknell Telephone Memo. If the SF-52 was destroyed, Ms. Apodaca requested that the NNSA provide her with the date of destruction, destruction official’s name, or a copy of the certificate of destruction relating to this document. *See* December 4, 2007 Appeal Letter. A search of records of the NNSA’s Human Resources Department yielded no records responsive to Ms. Apodaca’s request. *See* Becknell Telephone Memo.

With regard to the SF-52 relating to the Becknell Award, the NNSA informed us that it conducted a search for the document and identified no records responsive to Ms. Apodaca’s request. *Id.* Because this group award was created via nomination form⁴, no SF-52 was generated. *Id.* Thus, the NNSA was unable to provide Ms. Apodaca with the SF-52 because it does not exist. *Id.*

³ All OHA decisions issued after November 19, 1996 may be accessed at <http://www.oha.doe.gov/foial.asp>.

⁴ NNSA provided Ms. Apodaca with a copy of the group nomination form for her review. *See* Becknell Telephone Memo.

As for the documentation relating to the Becknell QSI, the NNSA advised that it searched its records and found that no justification document exists⁵. *Id.* According to the NNSA, a further search of the Human Resources official personnel files and Ms. Becknell's supervisor's official personnel files, produced no records responsive to Ms. Apodaca's request. *Id.*

The courts in *Truitt* and *Miller* require that an agency responding to a FOIA request must "conduct a search reasonably calculated to uncover all relevant documents." Based on the foregoing, we find that NNSA performed an extensive search reasonably calculated to reveal documents responsive to Ms. Apodaca's request. Accordingly, the search was adequate under the FOIA and, therefore, Ms. Apodaca's appeal should be denied.

It Is Therefore Ordered That:

- (1) The Appeal filed on December 5, 2007 by Terry Martin Apodaca, OHA Case No. TFA-0231, is hereby denied.
- (2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. §552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Fred L. Brown
Associate Director
Office of Hearings and Appeals

Date: December 18, 2007

⁵ Ms. Apodaca asserts that the justification document regarding the Becknell QSI should exist. *See* Memorandum of Telephone Conversation between Terry Martin Apodaca and Avery Webster, OHA (dated December 12, 2007). However, based on conversations with the NNSA, I am satisfied that this documentation is not located within the agency records.